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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1004

STARLING GENE HELM, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled case on November 10, 1967.

CITATIONS TO OPINIONS BELOW

There is but one opinion below, and that is the per curiam opinion of the Court of Appeals (No. 11,551), decided November 10, 1967, which affirmed the judgment below, and it is printed in the Appendix, *infra,* p. 1a, and is unreported.

JURISDICTION

The judgment of the United States Court of Appeals was entered on November 10, 1967. On December 20, 1967, the United States Court of Appeals entered an order denying a Motion to Extend Time for the Filing of Petition for Rehearing. On December 12, 1967, Mr. Chief Justice Warren issued an order extending the time in which to file this petition for a writ of certiorari up to and including January 9, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I.

Was registrant denied procedural due process when, following a reclassification from II-S to I-A, he went to the local Selective Service Board, within ten days of notice of reclassification, and was told by the clerk that he couldn't do anything? (Reclassification notice received by petitioner did state that he had the right to appeal, but it also stated that for information and advice go to your local board.)

II.

Was registrant denied procedural due process when clerk of local board to whom he had gone for advice following reclassification, within the ten day period, failed to advise him that he had the right to see a Government Appeal Agent and/or a legal advisor?

III.

Whether the presentation to a local Selective Service Board of a non-frivolous claim for reopening and consideration of a new Selective Service classification as a conscientious objector requires the local board to reopen such classification?

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves the due process clause of the Fifth Amendment and the religious liberty clause of the First Amendment.

The statute involved is Section 6(j) of the Universal Military Training and Service Act of 1950, as amended, 50 U.S.C. App. § 456(j), which at all times pertinent to this case, read as set out and printed in the Appendix, *infra*, pp. 3a-4a.

A number of Selective Service Regulations which were in effect at all times pertinent to this case are also involved. They are 32 C.F.R. § 1625.2, 32 C.F.R. § 1625.4, 32 C.F.R. § 1625.11, 32 C.F.R. § 1625.12, 32 C.F.R. § 1625.13, 32 C.F.R. § 1625.14, all of which are printed in the Appendix, *infra*, pp. 5a-7a.

STATEMENT OF THE CASE

Petitioner failed to report for induction into the Armed Forces at Asheboro, North Carolina, on July 28, 1966. His defense is that he was and is a conscientious objector, and that his Local Selective Service Board had improperly and unlawfully refused to so classify him or provide the normal administrative process. He was indicted, tried by a jury, found guilty, and sentenced to two years imprisonment in the United States District Court for the Middle District of North Carolina on June 12, 1967.

Petitioner was born December 21, 1940; registered with the Local Board No. 77 on December 24, 1958; was placed in Class 1-A on July 27, 1959; was reclassified 2-S on October 28, 1963; was again placed in Class 1-A on March 14, 1966.

Within ten days of March 14, 1966, petitioner asked the clerk of the local board what he could do about his classification. He was told, in effect, nothing could be done. No written notice of appeal was given within the ten day period following the last placement in Class 1-A.

On March 28, 1966, petitioner was ordered to report for physical examination on April 27, 1966; which he did; and on May 5, 1966 he was declared acceptable. On June 9, 1966 petitioner received current information questionnaire, which he returned on June 16, 1966. June 27, 1966 he was ordered to report for induction on July 28, 1966. After request by petitioner, on July 12, 1966, the local board sent a letter, advising that he would be given a chance to appear on July 18, 1966.

On July 18, 1966, petitioner appeared in person and presented a letter to the effect that he was the only son in a family with his people dependent upon him and "I am conscientious objector to war, to aid in it in any way." July 19, 1966 board sent letter declining to reopen his classification.

July 22, 1966, the board furnished petitioner with SSS Form 150 (special form for conscientious objectors), which was completed and returned to board on July 26, 1966; on this same date the board notified petitioner that they declined to request authority to reopen his classification and that he was expected to report for induction on July 28, 1966.

The clerk of the local board and the petitioner were the only witnesses for both parties in the District Court. The evidence offered by each side was in most respects the same, and in no event was the testimony of either witness challenged as to any material fact.

No explanation was offered by the government about the alleged improper advice to the registrant. No explanation was offered by the defendant why he had not followed the normal procedures, except that in effect, he had relied upon the advice of the clerk of the local board that nothing could be done. Petitioner did not explain why he had never been explicit in the past with reference to beliefs that might have qualified him as a conscientious objctor, i.e. late crystalization of concepts with added maturity or as the result of the need to think through his situation when induction became imminent.

The United States Court of Appeals rejected the petitioner's position in a per curiam opinion, relying on 32 C.F.R. § 1625.2(b) and *United States* v. *Al-Majeid Muhammad,* 364 F. 2d 223 (4 Cir. 1966).

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the Court of Appeals has decided important questions of Federal law which have not been but should be settled by this Court; because some of its holdings conflict with decisions of other Courts of Appeals, and appear to conflict with applicable decisions of this Court.

I.

There is a direct conflict between the statute 50 U.S.C. App. § 456(j), which granted appellate rights both regular and special to all conscientious objector claimants and the regulation which sought to deny these rights in the case of claims asserted after an order to report for induction. 32 C.F.R. § 1625.2; Appendix, *infra,* p. 5a. The Fourth Circuit has consistently held that the regulation is binding as to time, *United States*

v. *Al-Majeid Muhammed,* 364 F.2d 224 (4th Cir., 1966), cited in the per curiam opinion of the United States Court of Appeals. It is conceded that this reflects the majority view, but there is some minority opinion that there is no time limitation upon the rights granted by the statute. *United States* v. *Underwood,* 151 F. Supp. 874, 876 (E.D. Pa. 1955); *United States* v. *Crawford,* 119 F. Supp. 729 (N.D. Calif. 1954).

As District Judge Gainey (now Third Circuit Judge) held in Underwood:

> "It is plain that a person meeting the conditions of the above section of the Act is not to be subjected to combatant training and service. This privilege is not to be defeated by procedural regulation. No where does it provide that unless the registrant makes his claim before the notice of induction, he thereafter waives his right to the privilege. Had Congress so indicated it would have set forth such intention in unmistakable terms."
>
> 151 F. Supp. at 876.

This Court should resolve the conflict between the Circuits by holding that a Selective Service regulation which is "out of harmony with the statute is a mere nullity". *Manhatten General Equipment Company* v. *Commissioner,* 297 U.S. 129, 134 (1936). This should be particularly persuasive when it is considered that under the regulations applicable in this case, the majority view holds that after the expiration of 10 days all right to administrative review is lost unless an appeal in writing is taken. In this case the petitioner appeared before the clerk of the board and was apparently told that there was no remedy. The record is silent. But, it seems that the registrant did not articu-

late the nature of his objection to the classification at the time he made oral inquiry of the clerk.

It seems difficult to believe that the petitioner had the right to a fair hearing, in view of the fact that he was informed that there was nothing he could do, and the clerk failed to inform him of his right to contact a Government Appeal Agent. The Court, in *Simmons* v. *United States,* 348 U.S. 397, 406 (1955), indicated that a claimant's right to a fair hearing was a "fundamental safeguard".

It is interesting to note that in *United States* v. *Al-Majeid Muhammed, supra,* upon which the Court of Appeals relied and in *Davis* v. *United States,* 374 F. 2d 1 (5th Cir., 1967), which cited *Al-Majeid Muhammed* with approval, that in neither case did the registrant make any indication whatsoever of his objection to the classification within the ten day period, contrary to the instant case; also, in both of these cases of late objectors the Court in passing indicated a lack of merit in the registrant's contention as to his conscientious objections. The petitioner in this case returned the form SSS 150 to the local board on July 26, 1966, and on the same date was notified that his classification would not be reopened. No where in the record is there any substantial reference as to the merit of the petitioner's claim.

Though it be conceded that an orderly method for determining which draft registrants are entitled to exemption as conscientious objectors, it is difficult to believe that strict adherence to a rule requiring notice of appeal in writing within ten days does not affront due process concepts in face of the fact that the registrant appeared in person within the prescribed time and indicated his dissatisfaction with his classification.

Is the benefit of the exemption to be granted solely to the well educated and well advised, and to be systematically denied to the unsophisticated, the untutored, or the unintelligent. This Court should grant Certiorari to remedy such an abuse.

CONCLUSION

This petition should be granted for one or more of the reasons heretofore stated.

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11,551.

UNITED STATES OF AMERICA, *Appellee,*

versus

STARLING GENE HELM, *Appellant.*

PPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, AT GREENSBORO. EDWIN M. STANLEY, CHIEF DISTRICT JUDGE.

Argued November 8, 1967. Decided November 10, 1967.3

Before WINTER and BUTZNER, Circuit Judges, and WOODow W. JONES, District Judge.

. F. Seawell, Jr., (Seawell, Van Camp & Morgan on brief) for Appellant, and William H. Murdock, United States Attorney, (R. Bruce White, Jr., Assistant United States Attorney, on brief) for Appellee.

ER CURIAM:

Appellant, who was convicted for failure to report for duction in violation of 59 U.S.C.A. (Appendix) § 462, peals from the judgment sentencing him to a term of two

years. He claims that he was improperly ordered to report, because he had been denied classification as a conscientious objector or as a farmer and denied a hearing to establish his claim thereto.

We affirm.

Our review of the record discloses that appellant, during the five and one-half years that he was registered with his Local Board prior to receiving a notice of induction, never made a claim that he was a conscientious objector or a farmer, and that such claim came only after he had received a notice to report for induction, and five months before he would have attained the age of twenty-six years and have been draft-exempt under current policy. There was thus no reason to afford him a hearing before the order to report for induction; and after the order to report for induction, there was no factual basis on which it may be concluded that there was such a "change in registrant's status resulting from circumstances beyond his control" within the meaning of 32 C.F.R. § 1625.2(b), such as to require the Board to reopen his case after the order to report for induction. *United States* v. *Al-Majeid Muhammad*, 364 F. 2d 223 (4 Cir. 1966).

Affirmed.

STATUTE

50 U.S.C. App. § 456(j), which, at all times pertinent* to this case, read as follows:

> "(j) Nothing contained in this title [sections 451-454 and 455-471 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title [said sections], be assigned to non-combatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such non-combatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) [section 454(b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate. . . . Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board.

---

* The Military Selective Service Act of 1967, effective July 1, 1967, made certain amendments to Section 6(j) not relevant to this case.

Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title [said sections], he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) [section 454(b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [section 462 of this Appendix], to have knowingly failed or neglected to perform a duty required of him under this title [sections 451-454 and 455-471 of this Appendix]. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."

REGULATIONS

Title 32, Code of Federal Regulations

§ 1625.2 When registrant's classification may be reopened and considered anew.

"The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

§ 1625.4 Refusal to reopen and consider anew registrant's classification.

"When a registrant, any person who claims to be a dependent of a registrant, any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, or the government appeal agent files with the local

board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. In such a case, the local board, by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file. No other record of the receipt of such a request and the action taken thereon is required."

§ 1625.11 Classification considered anew when reopened.

"When the local board reopens the registrant's classification, it shall consider the new information which it has received and shall again classify the registrant in the same manner as if he had never before been classified. Such classification shall be and have the effect of a new and original classification even though the registrant is again placed in the class that he was in before his classification was reopened."

§ 1625.12 Notice of action when classification considered anew.

"When the local board reopens the registrant's classification, it shall, as soon as practicable after it has again classified the registrant, mail notice thereof on Notice of Classification (SSS Form No. 110) to the registrant and on Classification Advice (SSS Form No. 111) to the persons entitled to receive such notice or advice on an original classification under the provisions of § 1623.4 of this chapter."

§ 1625.13 Right of appeal following reopening of classification.

"Each such classification shall be followed by the same right of appearance before the local board and the same right of appeal as in the case of an original classification."

§ 1625.14 Cancellation of Order to Report for Induction or for Civilian Work by reopening of classification.

"The reopening of the classification of a registrant by the local board shall cancel any Order to Report for Induction (SSS Form No. 252) or Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153) which may have been issued to the registrant, except that if the registrant has failed to comply with either of those orders, the reopening of his classification thereafter by the local board for the purpose of placing him in Class IV-C or Class V-A shall not cancel the order with which he failed to comply."

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Middle District of North Carolina, petitioner was convicted of wilfully failing to report for induction as ordered, in violation of 50 U.S.C. App. 462. On June 12, 1967, he was sentenced to two years' imprisonment. The court of appeals affirmed *per curiam* (Pet. App.).

The evidence showed that petitioner registered with his local Selective Service board in December 1958 and

was classified 1-A in July 1959. In October 1963 he was reclassified 2-S and on March 14, 1966, having completed his school requirements, he was again placed in class 1-A (Tr. 7-9, 23). On June 16, 1966, after having had a physical examination and been declared acceptable, petitioner returned a current information questionnaire, but did not claim to be a conscientious objector (Tr. 11-12). On June 27, 1966, petitioner was ordered to report for induction on July 28, 1966 (Tr. 13). On July 12, 1966, he was notified that pursuant to his request for an interview he should appear before the local board on July 18, 1966 (Tr. 14). On the appointed day, petitioner came before the board and tendered a letter, which stated (Tr. 15):

> I am farming now and have been doing so for the past several years . . . . I have no one to take it over; I am the only son in family. My people depend on me to help them carry on their home. I am conscientious objector to war, to aid it in any way.

Petitioner did not give any reasons for his claim, either orally or in writing (Tr. 15). On July 19, 1966, the local board sent a letter to petitioner advising him that, on the basis of the information he had presented, they declined to reopen his classification (D. Exh. 2, 41).

On July 22, 1966, the clerk, believing that petitioner had possibly not explained his reasons for his claim to the local board, mailed the special form for conscientious objectors to petitioner (Tr. 16). Petitioner returned the form on July 26, 1966. His answers to

the questions asking for an explanation of the source and nature of his beliefs were "From reading Bible" and "I believe the Bible." He replied "None" to the question asking in what circumstances he believed in the use of force. He stated that he had never given public expression to the views relied on as the basis for his conscientious objector claim (Tr. 16-18; Govt. Exh. 1, 48). On the day on which petitioner returned the form (July 26, 1966), the local board, after reviewing it, notified him that it had met and determined that there was insufficient evidence to justify reopening his classification and that he was expected to report for induction on July 28, 1966 (Tr. 19). Petitioner did not report (Tr. 21, 57).

1. It is clear from the facts that petitioner was afforded full opportunity to present information to his local board to substantiate the conscientious objector claim which he made for the first time after receipt of his induction notice. The information which he provided, however, was plainly insufficient to warrant a finding that there had "been a change in [petitioner's] status resulting from circumstances over which [he] had no control." 32 C.F.R. 1625.2. The refusal to reopen his classification was thus proper. *E.g.*, *Davis* v. *United States*, 374 F. 2d 1 (C.A. 5); *United States* v. *Al-Majeid Muhammud*, 364 F. 2d 223 (C.A. 4); *United States* v. *Taylor*, 351 F. 2d 228 (C.A. 6); *Boyd* v. *United States*, 269 F. 2d 607 (C.A. 9); *Keene* v. *United States*, 266 F. 2d 378 (C.A. 10); *United States* v. *Yancey*, 368 F. 2d 816 (C.A. 2).

Some courts of appeals have held that a conscientious objection which "crystallizes" after receipt of a

notice of induction may be a change of status over which a registrant has no control and, thus, that such a claim must be considered even if presented after notice of induction. *E.g.*, *United States* v. *Gearey*, 368 F. 2d 144 (C.A. 2), No. 564, this Term, certiorari denied, November 13, 1967. Here petitioner's claim was in fact considered by the local board after notice of induction but was properly found to be without substantiation.

2. Petitioner testified at the trial that on March 15, 1966 (after being placed in class 1-A, but before his physical examination) he went to his local board and told the clerk that he desired an appearance before the board, but the clerk said that there was nothing she could do (Tr. 42, 61). The clerk testified that she could not remember petitioner's coming to her and requesting an appeal or a hearing (see Tr. 23, 24, 65). She recalled that on March 23, 1966, petitioner did come to her and request an explanation for the reclassification, which she furnished (Tr. 64-65).

Petitioner contends that he was denied due process because the clerk did not, in March, advise him of his right to see a government appeal agent. Even assuming an obligation on the part of the clerk to do so, no prejudice resulted since petitioner had not even asserted a claim of conscientious objection at the time.[1] It is well settled that mere irregularities in the admin-

[1] As noted above petitioner did not assert such a claim on the current information form which he submitted on June 16, 1966, some three months after his alleged conversation with the clerk.

istration of the Selective Service Act will not provide a defense in the absence of a showing of prejudice. See *Pate* v. *United States*, 243 F. 2d 99, 104 (C.A. 5); *United States* v. *Wolfe*, 172 F. Supp. 343 (E.D. Mich.), affirmed, 256 F. 2d 434 (C.A. 6); *United States ex rel. Lipsitz* v. *Perez*, 372 F. 2d 468, 469 (C.A. 4).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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